SUPREME COURT, U.S.
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NO. 93-2053

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ENPLANAR, INC., ET AL., PETITIONERS

VERSUS

TOGO WEST, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE BRIEF OF PETITIONERS

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RESPONSE TO "QUESTIONS PRESENTED"

1: The requested relief in the district court was not for an injunction directing the Army Corps of Engineers to award particular contracts to [petitioners] under Section 8(a) of the Small Business Act.(Opp. 7) Rather, injunctive relief was requested to restart the 8(a) program *and* to cause the two projects to be withdrawn from public procurement and replaced in the 8(a) program.(Pet. A-25).

2: "Whether the district court lacked jurisdiction over petitioners' claim against the Corps for an unspecified amount of monetary damages," fails to reveal that Keeler's initial monetary claim was alternative and made *before* the project was awarded, and that it would have been mooted by the declaratory and injunctive relief successfully opposed by Respondents. Moreover, the question is phrased as though a monetary damage remedy "*at law*" was requested. However, Keeler's residuary monetary claim is actually *equitable* in nature[1] and arose because the Corps withdrew the project for discriminatory reasons and subsequently (despite the filing of this suit) advertised and awarded the contract adversely.

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[1] "[T]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as money damages." *Dia Navigation Co., Ltd. v. Pomeroy*, 27 F.3d 918, 929 (3d Cir. 1994), quoting *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). "[A} monetary award can in some instances constitute equitable relief rather than money damages for purposes of § 702." [*Id.* at 930.]

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RESPONSE TO BRIEF IN OPPOSITION

Serious questions of agency discrimination against minority business and conflicts among the courts of appeal concerning the jurisdiction over claims for redress are presented by this Petition. The importance of these issues is underlined by the serious lack of candor in Respondents' Opposition.

STATEMENT

1. Respondents imply that the challenge to the setaside program occurred in 1990 (Opp. 2).In reality the challenge began in 1981 or 1982 and resulted in *Valley Const. Co. v. Marsh*, 714 F.2d 26 (5th Cir. 1983). The opinion in *Fordice Const. Co. v. Marsh*, 773 F.Supp. 867, 869-70 (S.D.Miss. 1990) was rendered in March of 1990 and the judgment in

April, the same month as the beginning of the secret, adverse actions against the 8(a) contractors, *e.g.* the withdrawal of setaside of the Southeast Pass and the demand on the SBA for economic impact studies on projects including Keeler's Cotton Meade. By August, Cotton Meade was withdrawn on a false pretext and after the Corps' written threat to SBA to publicly procure it if the SBA did not cause an economic impact study to be made on this non-reoccurring project in violation of its own regulations.

Respondents claim that the Corps sought legal advice from Army Headquarters concerning the overall legality of the Section 8(a) program after the alleged November, 1990 challenge (Opp. 2). However, the actual suspension began in October, 1990 and the wrongful effects, as on Southwest Pass and Cotton Meade, began in April. Indeed, the suspension was a direct result of a decision by the government to abandon its appeal of *Fordice*.[1]

The admission (Opp. 2) that no new contracts were awarded during this period is an understatement. Beginning in April, 1990, the Corps began to withdraw projects from setaside and refused to include new projects for 8(a) procurement.

Respondents' claim (Opp. 2) that Army Headquarters gave the Corps advice in late January of 1994[2] that the 100% set aside was "erroneous" is untrue and unsupported in the record (Pet. at A-6).

While stating (Opp. 3) that Keeler sought damages from its failure to receive the Cotton Mead project, respondents fail to explain that the damage claim was an *alternative* plea, which

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[1] *See, e.g.*, Brief of Marsh, et al., appellees, to 5th Cir. (S.D. Miss)

[2] Should be 1991

only matured after the projects were adversely awarded timely despite requests for declaratory and injunctive relief.

Respondents aver (Opp. 3) that the district court's determination that "the Corps' resumption of its Section 8(a) program had mooted all claims for injunctive relief", but fail to state that this was held to be *erroneous* by the 5th Circuit (Pet. A-12). Similarly, their description of the first amended complaint against the Corps officials emphasizes the "unconstitutional retaliation" claims but does not mention other claims, such as those under the Equal Access to Justice Act, on account of the 8(a) program resumption, that were not properly subject to summary determination.

Although the court of appeal did not give effect to the normal consequences of the admitted lack of notice of summary judgment on the additional claims of the first amended complaint, it is clear that use of the supplemental memorandum as a summary judgment motion violated the district court's local rules (Pet. 7, n. 10) and did not provide the actual notice mandated by Rule 56(c). No motion for summary judgment was filed by the Corps contracting officers (Opp. 3). Only in the body of supplemental memorandum was the unconstitutional retaliation claim referenced. The *sotto voce* expansion of a summary judgment motion by means of a supplemental memorandum not so captioned violated the local rules of the district court. (Pet 7, n. 10) and the mandatory notice requirements of Rule 56(c). *National Fire Ins. v. Bartolazo*, 27 F.3d 518, 520 (11th Cir. 1994); *Missouri Pac. R. Co. v. Harrison-Fischer Mfg. Co.*, 26 F.3d 531, 539-40 (5th Cir. 1994); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994). "[A] district court may not grant summary judgment sua sponte unless the court gives notice and an opportunity to oppose summary judgment."

Respondents support the court of appeal's conclusion that the non-Keeler petitioners had failed to explain how discovery "would or could create a fact issue to overcome the . . . summary judgment motion." (Opp. 4, Pet. A-20.) Given the repeated Rule 56(f) motions and affidavits filed, it is clear that this threshold was unreasonably high, *Martel v. County of Los Angeles*, 21 F.3d 940, 945 (9th Cir. 1994), particularly since Keeler had demonstrated serious evidence of *discriminatory* intent sufficient to avoid summary judgment in Louisiana. *Resolution Trust Corp. v. North Bridge Associates, Inc.*, 22 F.3d 1198, 1207 (1st Cir. 1994); *St. Surin v. Virgin Islands Daily News*, 21 F.3d 1309, 1313 (3d Cir. 1994). This alone should have been enough to prevent summary judgment as to others similarly impacted who were prevented the same access to discovery. *Continental Ore. Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-699, 82 S.Ct. 1404, 1410-11 (1962); *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994). *Continental Ore*, *supra* at 1404, makes it clear that such rigid compartmentalization of evidence is inappropriate upon consideration of summary judgment. *Compare*, *Farmer v. Brennan*, No. 92-7247 (June 6, 1994) (remanding with instructions to reconsider the Rule 56(f) motion and requested discovery.)

Due to lack of Rule 56(c) notice in the district court, no hearsay objection was made to the document, not mentioned in depositions and first disclosed in the supplemental opposition, suggesting that the Corps contracting officers had relied on Corps instructions not to speak with petitioners. That this document was not provided in discovery would, if disclosed by a formal motion for summary judgment, have supported additional discovery under Rule 56(f), since its existence supports petitioners' contention that other important information in the possession of the government had been selectively produced or suppressed. *RTC*, 22 F.3d at 1205, 1205 ("Indeed, because the

government is rendered uniquely powerful by its vast resources and statutory authority, it has a special responsibility to abide by civil adjudicator rules. Here, RTC shirked this responsibility.), 1207 (facts needed to oppose summary judgment are in the government exclusive control); *Ethyl Corp. v. U.S.E.P.A.*, 25 F.3d 1241, 1246-47 (4th Cir. 1994).

2. Respondents' statement that "the district court . . . denied Keeler leave to file a second amended complaint seeking *injunctive* relief"[3] is also less than candid. There was no request for *injunctive* relief as to the two projects, since that relief had been made unavailable by respondents, but only *equitable* relief in the form of a substitute and restitutionary monetary award, *Bowen,* 487 U.S. at 900, and to prevent further occurrence of the same wrongful conduct. Moreover, the amended complaint asserted *Bivens* claims against individuals for suspending the 8(a) Program and discriminatorily withdrawing the Cotton Meade project and restated the APA discrimination claims.[4]

Respondents contend that § 702 did not provide jurisdiction because Keeler made no claim under the APA and because § 702 does not authorize monetary damages. In fact, the second amended complaint timely reinstated the APA claim and attendant jurisdiction. In addition, the statement that § 702 does not authorize monetary damages is not entirely correct. If money is sought to enforce a statutory mandate, it may be awarded as equitable relief. *Bowen,* 487 U.S. at 900. *Compare Ward v. Brown*, 22 F.3d 516, 520 (2d Cir. 1994); *Dia*, 27 F.3d 929-30.

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[3] Opp. at 6, emphasis added. 5th Cir. Record Excerpts 24-38.

[4] 5th Cir. Record Excerpts at 37 (*Bivens*), 32, 25, Count V, APA.

Although the 5th Circuit stated that the claims in Keeler's amended complaint were "nearly identical" to the claims unsuccessfully litigated in Louisiana, this amendment was, rather, an accurate forecast of what the 5th Circuit found to be lacking in the Louisiana pleadings, thus making it clear that these claims were proper in Mississippi. Although this result had been anticipated in the Second Amended Complaint filed in Mississippi, the district court, prior to 5th Circuit guidance and without analysis, refused to permit the filing of pleadings making claims in a manner which the 5th Circuit approved.

ARGUMENT

1. Respondents parrot the conclusion of the court of appeals that for petitioners to obtain an injunction against the Corps, "this order would also require injunctive relief concerning the SBA's conduct." However, SBA had already protested both the removal of the Cotton Meade and Southwest Pass projects as well as the attempt by the Corps to change the regulations to force SBA to provide economic impact statements on non-recurring projects. How can injunctive relief, which furthers stated SBA goals, be construed as adverse to the agency, since it was solely the Corps which had been secretly[5] revising regulations and withdrawing setaside projects for false and pretextual reasons?

The 5th Circuit's statement, "[I]f a court ordered the Corps to award these projects to specific 8(a) participants, this order would also require injunctive relief concerning the SBA's conduct as to its statutory duties regarding its selection of 8(a)

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[5] "[W]hen a proposed regulation of general applicability has a sustained impact on . . . an important class of the members or the products of that [regulated] industry, notice and opportunity for comment should first be provided." *Phillips Petroleum Co. v. Johnson* 22 F.3d 616, 620 (5th Cir. 1994).

contractors for a specific project, and its subsequent negotiations with a procurement agency concerning the terms of the project's contract"[6] is simply an *ipse dixit*. It lacks any explanation or justification of how such an injunction was actually against the SBA or would have affected the SBA.

Respondents assert that EJA was not entitled to injunctive relief because it "no longer exists, and therefore it cannot perform the contract." (Opp. 4, Pet. A-14, n. 7.) However, EJA existed at the time of the project award and could have performed the contract until the time it was performed by others. By this reasoning, if the contractor is put out of business by being unlawfully deprived of the contract, he has no recourse, whereas if he is *not* mortally injured he can qualify for relief.

Respondents' attempt to distinguish *Ulstein v. U.S.*, 833 F.2d 1052 (1st Cir. 1987) because those plaintiffs sought an injunction against the Navy rather than the SBA highlights a similarity rather than a difference and does not diminish that court's holding that Section 634 does not preclude an injunction against the SBA in all circumstances.

While injunctive relief may no longer be available, equitable relief is not moot, *Bowen*, 487 U.S. at 900, so that petitioners have "suffered some actual injury that can be redressed by a favorable judicial decision".

2. The alternative sources of district court jurisdiction against the respondent agencies are 5 U.S.C. § 702, 15 U.S.C. § 734(b), 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1988, and the general Congressional policy that agencies engaged in commerce can sue and be sued. *Ward*, 22 F.3d at 519-520; *F.D.I.C. v. Hulsey*, 22 F.3d 1472, 1480-81 (10th Cir. 1994). Petitioners

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[6] Petition at A-12, n. 5.

have also asserted *Bivens* claims against individual defendants for which there is admitted jurisdiction in the district courts.

Respondents' contention that the APA does not authorize a claim for monetary damages flies in the face of the principle that a monetary award can be appropriate equitable relief under 5 U.S.C. § 702. *Bowen,* 487 U.S. at 900. *Bowen* establishes that equitable relief may take the form of a money award, not just injunctive relief. The *Bowen* plaintiffs brought an equitable claim and were permitted a monetary award. *Bowen,* 487 U.S. at 900 (1988); *Dia*, 27 F.3d at 929-30, *Ward*, 22 F.3d at 519-20. The *Bowen* criteria, here met, is that the suit not seek money in compensation for damage sustained from the government action, and must be to enforce a statutory mandate itself, which happens to be for money payment. *Bowen,* 487 U.S. at 900. If the district court's orders are for specific relief rather than money damages, they are within its jurisdiction under 5 U.S.C. § 702's waiver of sovereign immunity. *Bowen,* 487 U.S. at 900. The "crucial distinction is whether the claimant is seeking funds to which a statute entitles it, rather than money for losses due to the [government] agency's failure to [take action]." *Bowen,* 487 U.S. 879. Petitioners do indeed seek money, the only alternative left, to enforce statutory mandates of the APA and the 8(a) program. *Compare*, *Loveladies Harbor, Inc. v. United* States, 27 F.3d 1545, 1550-55 (Fed. Cir. 1994) and *Charles v. Rice*, 28 F.3d 1312, 1321-22 (1st Cir. 1994). In *Bowen*, the remedy was ultimately monetary.

3. Respondents reiterate that no claim was made in the district court that hearsay was improperly relied upon in granting summary judgment, but again fail to concede that the inability to do so was on account of lack of valid 56(c) notice Their argument on the proposed amendment in Mississippi fails, as discussed above, because the relief there requested was not identical to that in Louisiana, but constituted compliance with the later decision of the 5th Circuit of procedural defi-

ciencies in the Louisiana complaint. In the absence of this guidance, the Mississippi district court could not exercise its discretion.

4. Respondents' contention of "absolute agency discretion" of the Corps is not supported by law. *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1450-51 (D.C. Cir. 1994); *Hulsey*, 22 F.3d at 1480; *U.S. Dept. Interior v. 16.03 Acres of Land*, 26 F.3d 349, 354 (2d Cir. 1994). Absent "absolute agency discretion," petitioners had property rights and standing to assert the deprivation of their legitimate claim to entitlement to the benefits of the 8(a) program free from secret, arbitrary, and discriminatory agency interference. *Board of Regents v. Roth*, 405 U.S. 564, 577 (1982); *Turpen v. City of Corvallis*, 26 F.3d 978, 979-980 (9th Cir. 1994) (entitlement to water service could only be secured by notice sufficient to seek pre-termination injunctive relief.)

CONCLUSION

Petitioners were the victims of an interagency dispute that caused the Corps to secretly modify its regulatory intent, attempt to bend the SBA to its new regulations by threats against the 8(a) contractors, suspend the 8(a) program, and withdraw setaside projects for false and pretextual reasons. When petitioners sought relief in the district court, they were denied injunctive relief because of their minority status and eventually dismissed in Louisiana without adequate discovery or trial. The one survivor, Keeler, whose case was not dismissed because of solid evidence of discrimination but transferred to Mississippi, found itself without a remedy because its right to the requested relief, award of the Cotton Meade project, had been rendered impossible because of adverse agency action. Dismissal, rather than even transfer to the Court of Federal Claims, was the unfortunate result.

Certiorari should be granted. The decisions below should be vacated and reversed and the cases remanded for full discovery and for trial.

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